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Colorado Supreme Court Decisions

Dicta Editorial Board

COLORADO SUPREME COURT DECISIONS

(EDITOR'S NOTE.—It is intended to print brief abstracts of the decisions of the Supreme Court in the issue of Dicta next appearing after the rendition thereof. In the event of the filing of a petition for rehearing, resulting in any change or modification of opinion, such will be indicated in later digests.)

BANKS—ULTRA VIRES—RATIFICATION—NO. 12421—*The Illinois Building Company v. The Guardian Trust Company—Decided Feb. 2, 1931.*

Facts.—Plaintiff sued defendant to recover the amount claimed to be due under a lease entered into between plaintiff's predecessors and defendant's assignor. The District Court held that the defendant was not liable because the acts of the officers were ultra vires and that the defendant was not estopped to deny liability.

Held.—1. While a bank generally may not engage in commercial enterprises, still for the purpose of protecting its loans it undoubtedly has such right.

2. While the contract entered into with reference to the lease was ultra vires, the defendant was estopped to assert such ultra vires because the plaintiff had fully performed and the defendant had accepted the benefits of the contract.

Judgment reversed.

ATTORNEYS—UNPROFESSIONAL CONDUCT—DISCIPLINE—NO. 12780—*People v.* ————————. *Decided Feb. 2, 1931.*

Facts.—Committee on grievances of Colorado Bar Association made its report finding respondent guilty:

1. Of altering a check in striking out the words "in full payment of all claims to date".

2. Of taking forcible possession of certain building instead of resorting to the orderly process of the laws for obtaining possession.

3. Recommended that respondent be publicly reprimanded.

Held.—1. No lawyer can make, destroy, and alter evidence irrespective of whether such conduct constitutes crime and maintain his standing at the Bar.

2. No lawyer can ignore available legal remedies and resort to arms nor appeal thereto from the Courts, and maintain his standing at this Bar.

3. In view of the fact that respondent was a man of education and character, and had practiced law in this State for more than thirty years and held many important offices during that period and his professional reputation hitherto was without blemish, it was ordered that the reprimand be administered before the Court in chambers and not in public. And it was so done.

CONSTITUTIONAL LAW—POWER OF ATTORNEY GENERAL—PROSECUTION BY STATE BOARD OF PHARMACY—NO. 12479—*Colorado State Board of Pharmacy v. Hallett—Decided February 9, 1931.*

Facts.—This was an action by State Board of Pharmacy against defendant Hallett, an unlicensed druggist, to recover penalty for selling poisons. Prosecution below was by District Attorney. Defendant sought to quash complaint on ground that civil action for penalty could only be brought by attorney general and that legislative act which empowered District Attorney to bring action was unconstitutional. Lower Court held act unconstitutional and dismissed the action.

Held.—It was competent for general assembly by legislative act to repeal or abrogate any part of the common law. Therefore, although the attorney general, at common law, would be the only proper state officer who could maintain the suit, yet the legislature had the power to place the authority to bring such action in the District Attorney or special counsel.

Judgment reversed.

CONTEMPT—PUBLIC UTILITIES COMMISSION—NO. 12562—*People vs. Swena—Decided February 9, 1931.*

Facts.—The Public Utilities Commission sued Swena to recover the amount of a fine imposed by it in a contempt proceeding. It was alleged that Swena was operating a motor vehicle carrier without having obtained a certificate of public convenience and necessity and ordered him to desist and upon his failure to do so, the commission fined him $200.00 for such contempt. Trial Court dismissed the case.

Held.—The power to punish for contempt is a judicial power, not within the province of the commission. It belongs exclusively to the Courts, except in cases where the constitution confers such power upon some other body. Section 2975 C. L. Attempting to confer upon the Commission the power to punish for contempt is unconstitutional and therefore void.

Judgment affirmed.

CONVERSION—INNOCENT POSSESSION OF CHATTELS—No. 12465—*Lutz v. Becker—Decided February 9, 1931.*

Facts.—Plaintiff in error was defendant below and defendant in error, plaintiff. Plaintiff commenced action in conversion, claiming to be owner of certain chattels in the possession of defendant, which were commingled with certain chattels owned by defendant. Defendant did not claim title to plaintiff chattels and requested plaintiff to identify her property and remove it. Judgment for plaintiff.

Held.—The defendant did not exercise any distinct unauthorized act of dominion over personal property belonging to plaintiff. Neither the taking was wrongful nor did the possession amount to wrongful dominion. Conversion would not lie.

Judgment reversed.

INSURANCE—WAR RISK—FEDERAL ACT—BENEFICIARY—No. 12328—*Estate of Patrick J. McQuade, deceased, et al. vs. Anderson—Decided February 9, 1931.*

Facts.—Writ of error prosecuted to review decree of heirship of District Court affirming a similar decree of County court, awarding insurance proceeds of federal War Risk Insurance policy to widow of beneficiary under policy, she being the sole and only heir at law of the beneficiary. Proceeds were also claimed by uncle of deceased insured upon ground that proceeds must be distributed under the federal statutes to the heirs of the deceased soldier within a certain permitted class, which included uncle, but excluded widow of beneficiary.

Held.—That upon death of insured, under Section 303 of Act of March 4, 1925, the balance due under the policy was

payable to the estate of the insured and his father being the sole heir at law of this intestate son, who was the insured, that the father's estate was entitled thereto; that his widow, being his sole and only heir at law, is entitled to the balance of the insurance.

Judgment affirmed.

INSURANCE—LIFE—WAIVER OF NON-PAYMENT OF PREMIUM —NO. 12615—*The Reliance Life Insurance Co. vs. Wolverton—Decided February 16, 1931.*

Facts.—Defendant in error, who was plaintiff below sued defendant life insurance Company upon a life insurance policy issued to her deceased husband in which she was beneficiary. Defendant resisted payment on ground that an insurance premium was not paid when due nor within the period of grace allowed. Plaintiff relied on fact that even though not paid when due nor within period of grace thereafter that defendant had accepted and retained same and waived payment when due. Above issues submitted to jury which found for plaintiff.

Held.—(1) A condition in an insurance policy that it shall be void if premiums are not paid when due may be waived.

(2) After the receipt and unconditional acceptance of the money it is too late to declare a forfeiture.

(3) Forfeitures are not favored and courts should be liberal in construing the transaction in favor of avoiding a forfeiture.

Judgment affirmed.

PLEADING—DEMURRER—BILL OF INTERPLEADER—NO. 12709 —*Mason, et al. v. LeClair Mines Co.—Decided February 24, 1931.*

Facts.—LeClair Mines Company, the lessor, filed a complaint below in the nature of an original bill of an interpleader alleging that it held in its hands certain funds, which were claimed by lessees and sub-lessees in the mines, disclaiming any interest therein in lessor. Lessee filed a combination demurrer and answer. The demurrer was overruled, and the

lessee elected to stand on the demurrer. The Court below entered final judgment against lessee and held that the lessees were without right to participate in the fund.

Held.—1. The bill of complaint sets forth sufficient grounds requiring the respondents to interplead.

2. The Court below erred in holding that because the lessees elected to stand on the demurrer that they were denied the right to participate in the fund in dispute.

3. The records of the Court below not properly certified by the Clerk of the District Court will be disregarded.

Judgment reversed.

MUNICIPAL CORPORATIONS—CONSOLIDATION OF COUNTY AND CITY OFFICERS—DOUBLE SALARIES—NO. 12376—*Lail, et al. vs. City and County of Denver—Decided February 24, 1931.*

Facts.—Lail and others sought the reversal of a judgment rendered against them in an action on a bond brought by the City and County of Denver. Lail, at a time when he was Clerk and Recorder and Ex-Officio Clerk of the City and County of Denver, was appointed by the mayor, Public Trustee of the City and County of Denver, and continued for a time to exercise the duties of both offices. He received in full his salary as Clerk and Recorder and Ex-Officio Clerk, and retained a certain sum out of the moneys received by him as Public Trustee, claiming it was compensation for his services as such Public Trustee. Judgment below was against Lail.

Held.—Under Article XX of the State Constitution and the Charter of the City and County of Denver, there exists in the City and County of Denver a separate and distinct office of Public Trustee and the statutory salary of $5,000.00 per annum is applicable thereto, but under the charter provisions Lail was not entitled to receive any salary as Public Trustee in addition to his salary as Clerk and Recorder and Ex-Officio Clerk of the City and County of Denver.

Judgment affirmed.

WAR RISK INSURANCE—POWER TO DISPOSE OF BY WILL—NO. 12781—*In the matter of the Estate of Jones, deceased v. Wright, et al.—Decided February 24, 1931.*

Facts.—Residuary legatee in the will of deceased soldier seeks review of judgment of the District Court which awarded funds due under a Federal War Risk Insurance policy issued to deceased to personal representatives of deceased's beneficiary, who was his mother, and was also legatee of the Insurance under his will. Judgment below for personal representatives of deceased's beneficiary.

Held.—The insured soldier died testate, his mother being the beneficiary in the policy and also the legatee under the will, and she was left, him surviving. The balance of insurance in his estate must be paid out pursuant to the provisions of his will. The intention of the testator, as expressed in his will, was that his mother was to receive his U. S. Government War Risk Insurance Policy. Upon her death her personal representatives were entitled to the fund and not the residuary legatee.

Judgment affirmed.

SCHOOL LANDS — MINERAL RIGHTS — RESERVATIONS — NO. 12671—*Miller, et al. v. The Limon National Bank—Decided February 24, 1931.*

Facts.—The Bank was plaintiff below and brought this action under our Declaratory Judgment Act seeking a judicial determination of the duty of the State Board of Land Commissioners to draw a voucher in favor of the Bank for the return of money paid by it by mistake on an invalid certificate of purchase of State Lands. Judgment below for the Bank. The land was sold by the State, reserving mineral rights. Payments were defaulted and contract to purchase cancelled. The action was to recover back the money paid on the ground of mistake in that the reservation of the minerals was void.

Held.—1. The State Land Board was without authority to sell less than the fee title.

2. The validating act of the State Legislature of April 19, 1917, and of March 31, 1919, validated such certificates and was a ratification by the State of an unauthorized act.

3. Payments on the contract having been made subsequent to the decision in Gunter v. Walpole, 65 Colo. 234, and since the purchaser took no action of any kind indicating the withdrawal of his assent to the contract until long after they were validated, the contract stands as though fully authorized when made, and the cancellation and forfeiture of payments thereunder are in all respects as valid as if these sales had originally been sales of the fee.

Judgment reversed.

STATE LANDS—RESERVATION IN DEED—NO. 12417—*Driscoll, et al. v. The State of Colorado, et al.—Decided March 2, 1931.*

Facts.—The State Land Board sold State land to the Driscolls, reserving mineral rights, and thereafter gave the Texas Production Company an oil and gas lease on the reserved estate. The Board and the Texas Production Company brought the action in the Court below to enjoin the Driscolls from interfering with the reserved estate and the rights of the lessee. By answer and Cross-complaint the Driscolls claimed title in fee simple and demanded that the same be quieted in them. Demurrers were sustained to the answer, and the Driscolls elected to stand on their pleadings and prosecute this writ.

Held.—The notice of sale and certificate of purchase each contained the mineral reservation. At the time of the sale, the State Land Board had authority to sell and convey the fee title to the land in question, but nothing less. Hence the sale was invalid, but in 1917 and 1919 the General Assembly validated prior unauthorized sales of surface rights only of state lands. These validating acts were lawful. In this case the sale of surface rights only was in all respects as valid and binding as if duly authorized by statute when made in the first instance.

Judgment affirmed.

ATTORNEYS AT LAW—DISBARMENT—NO. 12548—*People v. Hillyer—Decided March 9, 1931.*

Facts.—Petition was filed by Attorney General against respondent that he be disbarred or otherwise disciplined. Referee found three charges sustained by the evidence.

Held.—1. The respondent misappropriated money collected by him for a client.

2. The respondent grossly neglected his duty as an attorney for a client in an action against a railroad company for damages for personal injuries.

3. The respondent converted to his own use, money entrusted to him by a client for the purpose of redeeming certain mining properties from tax sales.

Respondent disbarred.

MONEY HAD AND RECEIVED — BANKRUPTCY — CHATTEL MORTGAGES — NO. 12290 — *Johnson v. The National Sugar Mfg. Co. et al.—Decided March 30, 1931.*

Facts.—Johnson, plaintiff below, brought action on grounds of money had and received against the National Sugar Mfg. Co. One, Rife, gave chattel mortgage on his beet crop to said sugar company. Subsequently, he gave a junior chattel mortgage on same crop to Johnson. After crop was delivered to sugar company, Johnson demanded that sugar company pay his junior mortgage out of proceeds, after first deducting senior mortgage owing to sugar company. Subsequently, Rife filed petition in bankruptcy, was adjudicated a bankrupt and a trustee appointed and by intervention the trustee in bankruptcy became a party to this action. The sugar company, on order of referee in bankruptcy, paid the proceeds of crop to the referee instead of to the plaintiff. Judgment for sugar company below.

Held.—1. Sugar company, after demand by plaintiff, made payment to referee at its peril.

2. Junior mortgagee is entitled to any part of the proceeds remaining after satisfying prior encumbrances.

3. The complaint herein is one in assumpsit for money had and received, and it is not in conversion.

4. Where one has in his hands funds which in equity and good conscience belong to another, the law creates a promise to pay said funds to the owner, and action in assumpsit for money had and received is a proper action to enforce payment.

5. Where plaintiff below withdrew his preferred claim filed in bankruptcy, the plaintiff is not precluded from bringing this action.

Judgment reversed.